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IN THE

# Supreme Court of the United States

October Term, 1943.

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No. 578.

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Southern Railway Company, *Petitioner*,

v.

The United States.

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On Petition for a Writ of Certiorari to the Court of Claims.

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## REPLY BRIEF FOR PETITIONER.

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## CASE CITED.

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SOUTHERN RAILWAY COMPANY, *Petitioner,*

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## REPLY BRIEF FOR PETITIONER.

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## STATEMENT.

The brief for the United States in opposition to certiorari is lacking in the candor to be expected of a brief for the Government. It misstates the question presented. It misstates the contention of petitioner. And it misstates the holding by the Court of Claims in *Louisville & Nashville R. R. Co. v. The United States*, 61 C. Cls. 1.

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## CITATIONS





574455—44

## THE QUESTION PRESENTED.

The Government's brief (p. 2), instead of stating the question presented, makes a statement which begs the very question to be decided. It says:

> Whether the court below properly held that under the Freight Land-Grant Equalization Agreement between the United States and petitioner the rates chargeable for transportation of government property were the *lowest net rates lawfully available*[1] between origin and destination over land-aided routes, even though such routes were not as short as the actual routes used for the transportation.

The Equalization Agreement itself requires petitioner to equalize the "lowest net rate lawfully available" between origin and destination. This case involves the question as to what were the lowest net rates lawfully available under the facts here presented. To beg that question is not to state the question presented.

The precise question presented is this: Under the Equalization Agreement is petitioner required to equalize net rates computed via non-competitive land-grant routes, no matter how circuitous and unavailable for actual movement of government traffic, or does "lawfully available" mean only such land-grant routes as might normally be available to and used by the Government in the absence of the agreement?

## PETITIONER'S CONTENTION.

The Government's brief purports to state petitioner's contention thus (pp. 6-7):

> Petitioner contends, however, as it did below, that the Equalization Agreement only required it to equalize net freight rates computed via land-grant routes, "which are in fact competitive *in the ordinary commercial sense,*" and not via the available "land-grant route

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[1] All italics ours.

> from point of origin to destination in fact producing the lowest net rate, regardless of whether such route is in fact *commercially* competitive and regardless of how circuitous and impractical it may be."

That is not a fair statement of petitioner's contention. The italicized language is not our language. It is taken from an inaccurate statement in the opinion below.

Petitioner has nowhere contended that it is only required to equalize net freight rates computed via land-grant routes "which are in fact competitive in the ordinary commercial sense." Such a contention would be obviously unsound. There may well be routes not considered competitive by commercial shippers but which might actually be used by the Government to avail of land-grant.

Our contention is that petitioner is only required to equalize net rates computed via routes which are competitive for Government traffic; that is, over which Government traffic might normally move in the absence of the Equalization Agreement (Petition, p. 3; Brief, pp. 30, 47).

No question of competition "in the ordinary commercial sense" is involved. Such competition has no pertinence to the problem.

## THE HOLDING IN THE LOUISVILLE & NASHVILLE CASE.

It does not aid proper disposition of the petition and of the question presented, for the Government to misstate, as it does in the footnote on pages 10 and 11 of its brief, the holding in *Louisville & Nashville R. R. Co.* v. *The United States*, 61 C. Cls. 1.

Only one of the two agreements passed on in that case, the Seaboard agreement, contained the limitation to the "usually traveled route." The other, the equalizing agreement participated in generally by the railroads, did not contain the words "usually traveled route," as the Court of Claims plainly stated at page 10 of its opinion.

# In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 578

SOUTHERN RAILWAY COMPANY, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

**OPINION BELOW**

The special findings of fact, conclusion of law, and opinion of the Court of Claims (R. 25–47) are not yet officially reported.

**JURISDICTION**

The judgment of the Court of Claims was entered on October 4, 1943 (R. 47). The petition for a writ of certiorari was filed on January 4, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

## QUESTION PRESENTED

Whether the court below properly held that under the Freight Land-Grant Equalization Agreement between the United States and petitioner the rates chargeable for transportation of government property were the lowest net rates lawfully available between origin and destination over land-aided routes, even though such routes were not as short as the actual routes used for the transportation.

## STATEMENT

The action in the Court of Claims was brought by petitioner to recover a balance alleged to be due on account of the transportation of freight for the United States, and the United States counterclaimed for alleged overpayments; both claims were decided for the Government upon the basis of a "Freight Land-Grant Equalization Agreement" between the parties.

To aid in the construction of railroads in the United States, the Government has granted land routes to many railroads upon condition that they furnish transportation to the Government at reduced rates (R. 74A; cf. *Southern Pacific Co.* v. *United States*, 307 U. S. 393); such railroads are known as "land-grant lines." Since it is the policy of the Government not to use non-land-grant lines where land-grant lines are available (22 Comp. Dec. 129, 130), numerous non-land-grant roads, in order to secure government busi-

ness, have entered into so-called equalization agreements under which they agree to accept the same rates over their lines as apply over the land-grant lines." These railroads are called "equalizing lines.

The facts in this case are stipulated (R. 55–74) and are as follows: On November 29, 1933, petitioner, Southern Railway Company, a non-land-grant railroad engaged in the carrying of freight and passengers in interstate and intrastate commerce (R. 55), entered into a "Freight-Land-Grant Equalization Agreement" with the United States under which petitioner agreed, subject to certain conditions not here pertinent (R. 55–56, 75)—

> to accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deduction account of land-grant distance from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement.

Between 1934 and 1938, while this Agreement was in effect, the Federal Surplus Relief Corporation, an authorized agent of the United States, made shipments of livestock, property of the

United States, over petitioner's lines from mid-west points to southeastern points (R. 56), and the Tennessee Valley Authority, also an authorized agent of the United States, made shipments of various kinds of Government property over petitioner's lines from and to south-central and southeastern points in the United States (R. 61, 22c).

All such transportation was over non-land-grant lines, and recognizing that under the Equalization Agreement the Government was to be charged no more than the equivalent land-grant rates for the transportation in question, petitioner allowed the United States deductions to which it would have been entitled had it shipped over a somewhat longer route between the origin and destination points which comprise certain land-grant mileage and which petitioner claimed was commercially competitive with the routes actually used (R. 57–72). However, the Government claimed deductions applicable to a still longer route between these points, comprising greater land-grant mileage. The pertinent tariffs on file with the Interstate Commerce Commission and applicable to commercial shipments between these points were the same regardless of mileage and whichever of these three routes was used (the actual route over petitioner's lines; the longer, partially land-grant, route selected by petitioner for equalization computations; and the still longer, partially land-grant, route selected by the Government for such computations); and peti-

tioner as well as the carriers using the other routes were parties to that tariff (R. 57–58, 62–65, 67, 69, 71).

The Government paid the rates computed on the basis of the third route, and petitioner brought suit in the Court of Claims for the difference between that amount and the amount due according to its calculations.[1] The United States counterclaimed for an alleged overpayment of $1,251.73 (R. 42, 46). The court below denied recovery to petitioner and entered judgment on the counterclaim for the Government (R. 47).

## ARGUMENT

The proper charges for the transportation in question admittedly depend upon the construction to be given the Equalization Agreement. In it, petitioner agreed "to accept for the transportation of property shipped for account of the Government * * * and for which the Government * * * is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available." Moreover, the Agreement states that

[1] For transportation of the Federal Surplus Relief Corporation livestock, petitioner claimed a balance of $9,896.90, subsequently reduced to $9,512.22 by abandonment of certain items (R. 28–29). For transportation of the TVA freight, petitioner claimed a balance of $1,517.21, which petitioner subsequently reduced to $1,043.14 by abandoning some items (R. 35–36). A third cause of action on account of certain shipments alleged to have been billed improperly (R. 41) was subsequently settled by stipulation (R. 74, 43).

such rates are to be "derived" through deductions on account of "land-grant distance" from the lawful rates filed with the Interstate Commerce Commission "applying from point of origin to destination". (R. 56.) It is not denied that the Government would have been "lawfully entitled to reduced rates" if it had actually shipped the merchandise "over land-grant roads" from origin to destination via the route selected by it for computing equalization; that such reduced rates would be the regular tariff rates filed with the Interstate Commerce Commission for such a haul, less deductions on account of the land-grant mileage included within the route; and that the rates paid by the Government to petitioner (less the judgment on the counterclaim) were correctly computed if the route selected by the Government was properly used for computation. Indeed, the record reveals (R. 51–55, 58, 71) and the court below found (R. 44) that the land-grant routes selected by the Government as a basis for equalization were "admittedly" equally "available to the commercial public and to the government and could have been used for the making of all of the shipments in question."

Petitioner contends, however, as it did below, that the Equalization Agreement only required it to equalize net freight rates computed via land-grant routes "which are in fact competitive in the ordinary commercial sense," and not via the available "land-grant route from point of origin to

destination in fact producing the lowest net rate, regardless of whether such route is in fact commercially competitive and regardless of how circuitous and impractical it may be" (R. 43; Pet. 30). Conceding that no express language in the Agreement compels this construction, petitioner seeks to have it reached on the ground that the Agreement is "ambiguous" (Pet. 19). The Court of Claims correctly rejected this contention.

1. Because it "is the policy of the Government not to use" non-land-grant lines "when the land-grant or equalization lines are available" (22 Comp. Dec. 129, 130), "non-land-grant roads have entered widely into freight land-grant equalization agreements" for the purpose of obtaining "a share of government traffic." *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 394, fn. 1; see also 17 Comp. Dec. 979, 982; 20 Comp. Dec. 167, 169. The true purpose of an equalization agreement is thus to give the Government the benefit, in shipments over an equalizing road, of the land-grant rates available between the same points; and this objective requires that the land-grant route resulting in the lowest net rate be selected for computing equalization.

Petitioner's argument that the purpose of the Agreement was to secure for it "traffic which, in the absence of the agreement, would be likely to move over competing land-grant routes" (Pet. 30) ignores the obvious fact that competitiveness for

commercial purposes is not the same as for governmental purposes. As the court below pointed out, in "the transportation of government property the competition for it is between the non-land-grant or equalization carriers," but "a route which is competitive for commercial traffic may or may not be competitive for government traffic which is subject to reduced rates over lawfully available land-grant routes." A land-grant route over which the Government might ship its property in order to take advantage of lower rates may not be "a practical route over which commercial shippers not entitled to freight rate reductions ordinarily would elect to make their shipments." (R. 44; see 21 Comp. Dec. 744, 745.) Accordingly, the court below correctly found that the Equalization Agreement "was designed to give the equalizing carrier a portion of the Government business that was possible of routing over the governing land-grant route" and "to give the Government a greater range in choice of routes where considerations of economy entered into the selection" (R. 27).[2]

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[2] This policy is reflected in the Regulations of the Quartermaster General, U. S. Army (issued in 1916, and effective at the time the agreement in question was entered into), which provide that if carriers "will not equalize the lowest net rates available on certain specified traffic, such traffic should not be forwarded via the carriers shown, unless no other route is available. Where special exceptions provide that the lowest available rate will not be protected via certain routes, such routes should not be used" (R. 45).

Reasons of policy support the literal construction of the Agreement. To require the selection, as a basis for equalization, of any route other than that yielding the "lowest net rates lawfully available" as a result of land-grant deductions from the lawful rates "applying from point of origin to destination" would, as the court below observed, lead to "uncertainty, confusion, and constant controversy" (R. 46). For then each movement of government property over equalization lines would require "a detailed and expert inquiry" (*ibid.*) as to which of all available land-grant routes running from point of origin to destination possessed the greatest degree of commercial competitiveness and hence was appropriate for equalization computations. These considerations should preclude any attempt to "import words into the contract which would make it materially different in a vital particular from what it now is" (*Gavinzel* v. *Crump*, 89 U. S. 308, 319).

2. Petitioner also contends that it is unreasonable to construe the Agreement as requiring equalization on the basis of available instead of competitive land-grant routes, since the former routes are often circuitous (Pet. 44). But it was stipulated below that the Equalization Agreement embodies no "excess mileage limitation" (R. 56). And, as the court below observed, "circuity routing is a well known factor in connection with transportation rates and is favored by carriers to secure traffic and by shippers to meet particular

situations," and these "matters were well known to the parties when the equalization agreement was made" (R. 44–45). See *In the Matter of Coal from and to Points in Alabama*, 238 I. C. C. 82, where carriers applied to the Commission to maintain rates over certain routes, some of which were 161.8 percent circuitous.

Certainly circuity and relative mileage were not recognized by the Interstate Commerce Commission as factors justifying any different charges for different routes between the same points. The pertinent tariffs between the origin and destination points here involved were identical whatever route was taken, whether one of the land-grant alternatives or petitioner's non-land-grant route (R. 59, 62–65, 67, 69, 71). And it is clear that the reasonableness of the rates on the "circuitous" routes authorized by tariffs lawfully on file with the Interstate Commerce Commission cannot be attacked in this proceeding, as petitioner indirectly seeks to do (Pet. 31, 44). *United States Navigation Co., Inc.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481–483; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291.[3]

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[3] Contrary to petitioner's contention (Pet. 11, 13, 33), the decision below does not conflict with other decisions of the Court of Claims. *Louisville & Nashville R. R. Co.* v. *United States*, 61 C. Cls. 1, concerned the construction of an equalization agreement which was expressly limited to the "usually travelled route." The court there refused to uphold equalization via a circuitous land-grant route solely because of this limitation and expressly disavowed any intention to approve

## CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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"the use of the route in question as an equalizing route to the extent of establishing a controlling precedent" (61 C. Cls. 1, 11).

The reference in *Northern Pacific Ry. Co.* v. *United States*, 72 C. Cls. 563, to "competing routes" as a basis for equalization does not at all necessarily refer to those routes which are competitive for commercial as distinguished from government traffic. It is clear that the competition involved in the shipment of property subject to land-grant rates is that between non-land-grant lines and land-grant lines. See *Increased Railway Rates, Fares, and Charges*, 248 I. C. C. 545.

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